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PROFESSOR KMIEC: We now turn to the business cases and the commerce cases. Ladies and gentlemen, it is my privilege to introduce someone who has brought great intellectual life and many gifts to this law school. My only regret in the introduction is that the title he uses is Dean rather than Justice Kenneth Starr.

The Roberts Court Gets Down to Business: The Business Cases

Kenneth W. Starr*

We have been treated thus far to great conversation and times of great debate. We have discussed issues of war and peace, individual rights and liberties, whether the Fourth Amendment exclusionary rule should be abandoned, and the political process.

I am here to talk about the business cases. I was assigned this topic, but I take it on with gratitude and with enthusiasm, and I am here to convince you that the Supreme Court should be doing more of what I am talking about and less of what my colleagues have been talking about *because business cases do less damage*.

Let me say that I will take the opportunity, if my distinguished Chair and dear friend Professor Kmiec will allow me, to say a few things more broadly about the Roberts Court along the way, and then a few things even about the Rehnquist Court as we look back and salute our fallen late Chief Justice.¹

So what did the Court do and what can we look ahead to in connection to what Calvin Coolidge famously said, “The business of America is business?”² Whether one agrees with Mr. Coolidge or not, we begin this

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1. Chief Justice William H. Rehnquist died on September 3, 2005. Charles Lane, *Chief Justice William H. Rehnquist Dies*, WASH. POST, Sept. 4, 2005, at A01.

2. Cyndy Bittinger, Executive Director of the Calvin Coolidge Memorial Foundation, notes that this is a famous misquote of a line in a speech to the American Society of Newspaper Editors in Washington, D.C. Cyndy Bittinger, *The Business of America is Business?*, http://www.calvin-coolidge.org/html/the_business_of_america_is_bus.html (last visited Oct. 2, 2006). According to her, the real quote is: “After all, the chief business of the American people is business.” *Id.*

part of our afternoon reflections with a reminder that the Court during Chief Justice Rehnquist's stewardship was not, in the views of many, particularly interested in business cases. Will the Roberts Court be different?

I confess that almost exactly thirteen years ago, I authored two consecutive op-ed pieces in the *Wall Street Journal*, suggesting at that time that the Court was not taking enough cases, that it should take more cases, and that in all events the Court should not be allowing circuit splits to fester—especially in arenas of law where labor, management, and others needed guidance.³ My two pieces clearly had a remarkable effect, though not quite what I wanted, because after they were published the Court started hearing even fewer cases.⁴

Especially with the retirement in the early 1990s of two leading members of what I considered and applauded as circuit conflict police officers—Justice Byron White⁵ and Justice Harry Blackmun⁶—few, if any, voices on the Court claimed they ought to be more energetic in terms of quantity—not necessarily writing 178 pages in a single case⁷—but taking more seriously the responsibility to eliminate the instability flowing from unresolved conflicts that were infecting the vast body of federal law.

Well, it is a new day, and we have a very good listener in Chief Justice Roberts, well known for his energy and his work ethic and who seems, in view of statements at the confirmation hearings during a colloquy with Senator Kohl, to be of the view that the Court should indeed take more cases.⁸ This is ideal.

3. See Kenneth W. Starr, Op-Ed, *Rule of Law: Trivial Pursuits at the Supreme Court*, WALL ST. J., Oct. 6, 1993, at A17; Kenneth W. Starr, Op-Ed, *Rule of Law: Supreme Court Needs a Management Revolt*, WALL ST. J., Oct. 13, 1993, at A23.

4. Richard A. Posner, *The Supreme Court, 2004 Term: Foreword: A Political Court*, 119 HARV. L. REV. 31, 67 (2005).

5. Justice Byron White retired in 1993 after thirty-one years on the Court. The Supreme Court Historical Society: History of the Court, http://www.supremecourthistory.org/02_history/subs_timeline/images_associates/079.html (last visited Oct. 30, 2006).

6. Justice Harry Blackmun retired in 1994 after twenty-four years on the Court. The Supreme Court Historical Society: History of the Court, http://www.supremecourthistory.org/02_history/subs_timeline/images_associates/083.html (last visited Oct. 30, 2006).

7. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

8. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 335-37 (2005) (response of John G. Roberts, Jr. to questions submitted by Senator Kohl). Senator Kohl questioned John Roberts about the method by which the Court chooses the cases it will hear. *Id.* at 335-36. Roberts responded in part:

I have expressed the view—and it may be a view that I'll have to be educated on further if I am confirmed, and I am not stating it as a solid view. I do think there is room for the Court to take more cases. They hear about half the number of cases they did 25 years ago. There may be good reasons for that that I will learn if I am confirmed, but just looking at it from the outside, I think they could contribute more to the clarity and uniformity of the law by taking more cases.

Id. at 337.

Consider Judge Richard Posner, in his very provocative foreword to the *Harvard Law Review*, reviewing the 2004 Supreme Court Term, a term which proved be the final chapter in the Rehnquist Court with the venerable Chief passing on September 3rd of last year. Richard Posner was dubbed by William Brennan as one of two geniuses with whom he had had the privilege to labor or watch during his many years, indeed decades, on the Supreme Court.⁹ One was William Douglas and the other was his law clerk, Richard Posner.¹⁰ Judge Posner argues in the *Harvard Law Review* that the Supreme Court has become more politicized because it fails to take everyday prosaic cases; in simple terms it turns a blind eye and does not care about them.¹¹ Let Judge Posner's words speak for the judge: "[T]he more that constitutional law dominates the Court's docket, the more that appointments to the Court focus on the candidate's likely position in constitutional cases rather than on competence in business law and other statutory fields."¹²

I believe and submit to you that the Posnerian charge should be deeply troubling, especially in view of—let me summon them to the witness stand—opinion polls.

I am referring to public opinion polls commissioned by the American Bar Association and also polls for the Gallup Organization, suggesting strong public impression years after *Bush v. Gore*¹³ that the Supreme Court in particular, and that indeed courts more generally, are actively pursuing political agendas.¹⁴ An American Bar Association poll conducted just exactly one year ago showed that fifty-six percent of Americans believe, "Judicial activism . . . seems to have reached a crisis."¹⁵ Another poll, this one conducted by Gallup only three months previously in the summer 2005, showed that a historic low forty-two percent of Americans approved of the way the Supreme Court was handling its job.¹⁶ Now remember, these came a year before the unveiling of the Roberts Court.

This is not good. In fact, it is more. It is profoundly unfortunate and disquieting to all of us who love the Court. It is obviously indicative of the erosion of public confidence and certainly has the potential effect of eroding

9. John Giuffo, *Judging Richard*, COLUM. JOURNALISM REV., Nov-Dec. 2005, at 37, 41.

10. *Id.*

11. *See generally* Posner, *supra* note 4.

12. *Id.* at 79.

13. 531 U.S. 98 (2000).

14. Martha Neil, *Half of U.S. Sees 'Judicial Activism Crisis'*, A.B.A. J. E-Report, Sept. 30, 2005, <http://www.abanet.org/journal/redesign/s30survey.html>.

15. *Id.*

16. Joseph Carroll, *Americans' Ratings of the U.S. Supreme Court*, GALLUP POLL NEWS SERVICE, Sept. 13, 2005, available at <http://www.galluppoll.com/content/?ci=15331&pg=2>.

a bedrock value of judicial independence that was developed by Mr. Hamilton in *Federalist* 78.¹⁷

So even if one is not interested in the work of a world of business cases, perhaps there are reasons why those who do wish the Court well might be pleased to see the Court do more Posnerian type work and to take fewer of those CNN breaking news headline makers. Or, as my distinguished visiting professor colleague Grant Nelson¹⁸ might say—who used to teach constitutional law—he now teaches *real law*.

Now, it looks as if that may be happening. One swallow does not a business spring make, but looking ahead to the early months of the October Term 2006, it appears that the Court is actually going to be hearing more of these Posnerian cases rather than looking for new constitutional frontiers to march into and further politicize the Court. I could give examples, but time fails me. Check the listing of what the Court has scheduled to hear. By my count there are already on the docket eight hardcore “business cases.”¹⁹

But let me focus in my brief time remaining on six cases which those of you who are here for MCLE credit have in your materials, and draw from these quite varying cases some broader themes about the Roberts Court—and I’m going to call it that—during the rookie year of our new Chief Justice.

The first theme is that the Roberts Court at this early stage surely cannot be characterized as pro-business, even though no fewer now than seven of its members—have we forgotten, seven—were appointed by presumably business friendly Republican presidents as early as Gerald Ford.²⁰ Consider, for example, a major employment discrimination case under Title VII, *Burlington Northern & Santa Fe Railway Co. v. White*.²¹ The Court ruled

17. THE FEDERALIST NO.78 (Alexander Hamilton).

18. Professor Grant Nelson is the D & L Straus Distinguished Visiting Professor at Pepperdine University School of Law, Fall 2006. Pepperdine University School of Law, Academics, <http://law.pepperdine.edu/academics/faculty/gnelson.html> (last visited Oct. 30, 2006).

19. *Teleflex, Inc. v. KSR Int’l Co.*, 119 Fed. Appx. 282 (Fed. Cir. 2005), *cert. granted*, 74 U.S.L.W. 3720 (U.S. June 26, 2006) (No. 04-1350); *Confederated Tribes of Siletz Indians of Or. v. Weyerhaeuser Co.*, 411 F.3d 1030 (9th Cir. 2005), *cert. granted*, 74 U.S.L.W. 3720 (U.S. June 26, 2006) (No. 05-381); *Osborn v. Haley*, 422 F.3d 359 (6th Cir. 2005), *cert. granted*, 74 U.S.L.W. 3639 (U.S. May 15, 2006) (No. 05-593); *MedImmune, Inc. v. Genentech, Inc.*, 427 F.3d 958 (Fed. Cir. 2005), *cert. granted*, 74 U.S.L.W. 3471 (U.S. Feb. 21, 2006) (No. 05-608); *Metropoulos Telecomm., Inc. v. Global Crossing Telecomm., Inc.*, 423 F.3d 1056 (9th Cir. 2005), *cert. granted*, 74 U.S.L.W. 3471 (U.S. Feb. 21, 2006) (No. 05-705); *Hinkle v. Norfolk S. Ry. Co.*, 2006 WL 2521445 (E.D. Mo. 2006), *cert. granted*; *United States ex rel. Stone v. Rockwell Int’l Corp.*, 92 Fed. Appx. 708 (10th Cir. 2004), *cert. granted*, 75 U.S.L.W. 3162 (Sept. 26, 2006) (No. 05-1272); *Wachovia Bank v. Watters*, 431 F.3d 556 (6th Cir. 2005), *cert. granted*, 74 U.S.L.W. 3702 (June 19, 2006) (No. 05-1342).

20. Chief Justice John G. Roberts, Jr., and Justice Samuel A. Alito, Jr., were nominated by George W. Bush. Justices David H. Souter and Clarence Thomas were nominated by George H.W. Bush. Justices Antonin Scalia and Anthony M. Kennedy were nominated by Ronald Reagan. Justice John Paul Stevens was nominated by Gerald Ford.

21. 126 S. Ct. 2405 (2006).

quite emphatically in favor of employee rights in the face of a strong push by the business community, including the U.S. Chamber of Commerce, to go in exactly the opposite direction.²² The Court was unanimous in its judgment in favor of the employee, Sheila White, who claimed that her employer, the railroad, had retaliated against her in two ways.²³

This was an example of the Court stepping in exactly where it should. The courts of appeals were in disagreement with respect to the standard that guised retaliation as an actionable part of Title VII, and stepping in at those times is what the Court should do. But in doing so in the *Burlington* case, the Court fashioned a far-reaching, and some would say and have said, a litigation-producing standard that quite generously widens the region of employee protections.

One employment lawyer who advises the management side of the house was quoted by our friend and colleague in the fourth estate, Linda Greenhouse of *The New York Times*, saying that the decision would have a “huge effect” on the American workplace.²⁴ Whatever one’s views, I think one thing is clear: that this is a very important area of the law for the Court to be interested in. Retaliation claims happen to be a very dynamic part of the forum of discrimination law and the *Burlington* decision will now serve as a growth engine.

That may very well be a good thing in terms of progress towards a discrimination-free workplace, but it is my point that this is not a pro-business decision. I also hasten to cite—I will not discuss as I hoped to—the separate, solitary concurrence in the case by Justice Alito, the Court’s newest member,²⁵ who shows in his separate concurrence that he agrees with the judgment but disagrees with the standard articulated for all eight members of the Court who spoke through the quite powerful voice of Justice Breyer.²⁶

So, is the Roberts Court good for business? Consider the major property rights case—we’ve already discussed this a bit. Remember when we concluded last term, the nation was abuzz with Susette Kelo and her plight in New London?²⁷ Does everyone remember that one?

22. Brief for the Equal Employment Advisory Council and the Chamber of Commerce of the United States of America as Amici Curiae Supporting Petitioner, *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405 (2006) (No. 05-259), 2006 WL 235013.

23. *Burlington*, 126 S. Ct. at 2405 (9-0).

24. Linda Greenhouse, *Supreme Court Gives Employees Broader Protection Against Retaliation in Workplace*, N.Y. TIMES, June 23, 2006, at A22.

25. Associate Justice Samuel A. Alito, Jr., took his seat on the bench January 31, 2006.

26. *Burlington*, 126 S. Ct. at 2418 (Alito, J., dissenting).

27. *Kelo v. City of New London*, 545 U.S. 469 (2005).

The huge property rights case of this term, again referred to already, *Rapanos v. United States*,²⁸ was decidedly not a victory for the business community. The issue was whether the Army Corps of Engineers on behalf of the federal government could control the land development activity Mr. Rapanos commissioned, and it called upon the Court to interpret a very important part of the Clean Water Act—the “Waters of the United States.”²⁹ So that is our term. What is meant by the “Waters of the United States?”

We have said in our conversation thus far that it appears that in the Roberts Court unanimity is of value, and we talked about the Texas Ten Commandments case³⁰ and so forth where the Court has been divided in the past. Well, this is one of the huge divisions. The Court was divided four-one-four, with the Justice in the middle being the Justice to watch, Anthony Kennedy.³¹ The four Justices speaking through Justice Scalia—and I think his opinion is worth reading in terms of methods of statutory interpretation that are likely to be in the ascendancy in the Roberts Court—rebuffed the Army Corps of Engineers after it was to regulate what John Rapanos was seeking to do.³²

See, Mr. Rapanos’ land with water on it, called wetlands, was some eleven miles away from the nearest navigable waters—eleven to twenty miles depending on where you were measuring.³³ The plurality opinion by Justice Scalia very colorfully jousts with his colleagues over the interpretation of this pivotal language, “Waters of the United States.”³⁴ What does it mean? And the plurality, as the Court tends to do these days, takes us on a journey through dictionary land—have your Webster’s handy—and even uses a charming quotation from the movie *Casablanca*.³⁵

To the effect that there is the plurality side, the Army Corps of Engineers was seeking to perform a sort of reverse-Red Sea miracle by turning land into water. But no water, no jurisdiction by the federal government—it would become a state and local issue. The plurality invoked values of federalism, which is one of my sub-themes this afternoon.³⁶

The Clean Water Act passed by Congress in 1972 was, after all, an experiment in cooperative federalism with the states—like with the Clean Air Act—retaining very significant responsibilities for the development of

28. 126 S. Ct. 2208 (2006).

29. *Id.*

30. See *Van Orden v. Perry*, 545 U.S. 667 (2005).

31. *Rapanos*, 126 S. Ct. at 2214.

32. *Id.*

33. *Id.*

34. *Id.* at 2215.

35. *Id.* at 2218 n.2.

36. See *id.* at 2216. The plurality began its analysis with a view that “[t]he Corps’ new regulations deliberately sought to extend the definition of ‘the waters of the United States’ to the outer limits of Congress’s commerce power.” *Id.* (quoting 42 Fed. Reg. 37114 n.2 (1977)).

land and the protection of water resources.³⁷ But as the plurality saw it, under the Corps, federal control was open-ended and far-reaching, and the plurality concluded that this was inconsistent with not only the language of the statute—land is not water—but that the Corps intruded too deeply into traditional state and local control over land use development.³⁸ One hears echoes of *Susette Kelo*'s case.

The dissenters, led by Justice Stevens, relied less on statutory text and more on policy considerations.³⁹ They desired a pragmatic approach favoring greater departmental regulation.⁴⁰ Wetlands are very important.⁴¹ They support habitats for animals—habitats that obviously do play a very important role in reducing pollution.⁴² That fact, according to the dissenters, should empower the Army Corps of Engineers to generously interpret the Clean Water Act in ways that might seem—on the surface as it were, counterintuitive—mainly to regulate activity on land many miles away from navigable waters.⁴³

So that left Justice Kennedy as the person in the middle, and, happily for lawyers, his approach requires a very litigation-enriched case-by-case determination.⁴⁴ So we are very thankful to him. He has articulated his own “significant nexus” test, so call on the experts as well.⁴⁵ We litigators love this sort of thing.

Let us pause for a second and say that, in understanding this early term of the Roberts Court, there was a political opinion in this case that has been largely overlooked from my review of the commentary. It really was a cry from the heart of the new Chief Justice. He wrote a solitary concurrence in this land-versus-water case, lamenting that the Court's house was so divided that it left the state of the law mumbled and confusing.⁴⁶ But the Chief Justice is very smart and very skillful, so he took aim not at his colleagues, but at the Army Corps of Engineers.⁴⁷ For what? The Chief Justice seemed to think the Corps, in an imperious or at least insouciant attitude, was saying,

37. *Id.* at 2215.

38. *Id.* at 2223-24.

39. *Id.* at 2252 (Stevens, J., dissenting).

40. *See id.* at 2252-53.

41. *See id.* at 2257.

42. *Id.*

43. *Id.* at 2252.

44. *Id.* at 2249 (Kennedy, J., concurring).

45. *Id.* at 2236.

46. *Id.* at 2235-36 (Roberts, C.J., concurring).

47. *Id.* at 2235.

“We can do whatever we want to do.” I thought the Army Corps of Engineers was rather a nice shop, but apparently they are power mad.

All of this confusion could have been avoided, in the Chief Justice’s view, if the Army Corps of Engineers had developed through regulation some notion of the outer bounds of its authority.⁴⁸ Do you hear the echoes of what we were just talking about? The outer bounds were not specified, and so now the planning commissioners, real estate developers, home owners, and the Sierra Club are left to languish in uncertainty. It is all unnecessary.

Perhaps on that mid-June day when the Court issued the *Rapanos* opinion, and the Court was looking to the horizon of the summer recess, the Chief was actually saying to his colleagues, “Don’t do this. We can and should do better. Let’s try not to be a judicial house of Babel.” And encouraging the Court to speak with greater harmony did appear to be at the center of his confirmation hearings and of very high value. But will it work?

We now turn to one closely watched business case last term involving almost everyone’s friendly online auctioneer—Ebay.⁴⁹ Admit it. You have been selling things on Ebay. And that is a good thing. Welcome to the vast commercial marketplace which is what the founders envisioned. The Court was unanimous in rejecting a rigidity that had developed in a very important world of intellectual property.⁵⁰ Over time a rule had evolved in our nation’s very important and not sufficiently understood patent court, the Federal Circuit, that absent the most exceptional circumstances, courts are obliged once patent infringement has been found to issue a permanent injunction as if the night follows the day.⁵¹ The remedy is not just money or royalties, but an injunction that says to the infringer, “Stop it and stop it now. Don’t do it any more.” It seems very sensible, but this automatic injunction rule of the Federal Circuit actually represented a departure from the traditional role of equity.⁵²

What is supposed to happen, as law students who have taken a remedies class know, is that the judge is to make a very holistic determination applying well-settled, four-part standards and to come to a conclusion of whether an injunction really is necessary.⁵³ Won’t writing a check do the job just fine?

But this automatic injunction rule that the Federal Circuit had fashioned had, in the views of some, helped foster a cottage industry referred to pejoratively as—and I hope I don’t give any offense—“patent trolls,”

48. *Id.* at 2236.

49. *eBay, Inc. v. MercExchange, L.L.C.*, 126 S. Ct. 1837 (2006).

50. *Id.*

51. *Id.* at 1839.

52. *Id.* at 1840.

53. *Id.* at 1839.

meaning those who go out and very avariciously gobble up patents not for producing and selling goods, but for obtaining license fees. In Ebay's view, that was exactly what was happening to them, and they viewed it as a sort of entrepreneurial, creative extortion.

Let's be clear. Being a patent holder but not practicing the patent makes lots of sense to universities and inventors and so forth. Justice Thomas, before the unanimous Court, took all of this into account. So what to do? The unanimous Court essentially said, "The traditional rule applies."⁵⁴ No automatic injunctions. Federal Circuit, please, no more of this. This is a very important decision and it is a unanimous one."

But there was a very revealing drama within the *eBay* case, which did not go unnoticed. The drama was the battle of pesky concurring opinions. There was unanimity on the surface, but a disagreement erupted. Ironically, the battle was brought on by the unanimity-seeking Chief Justice. He had obviously assigned the opinion for the unanimous Court to Justice Thomas, and Justice Thomas wrote, in effect: "No automatic injunctions."⁵⁵ But the Chief Justice then crafted a very short, two-paragraph concurrence⁵⁶ that showed the new Chief Justice's love of history, essentially stating: "Okay, yes. Let's return to the traditional tests, but when we look historically at what has happened in these cases, injunctions have been issued in the 'vast majority' of patent cases where infringement has been found."⁵⁷ And by this little concurrence, the Chief Justice seemed to be putting his very impressive thumb on the scales of judges' power to grant injunctions—not automatically, but that is what had been done historically. He must have been delighted to receive the news in the Court, asking him to please join the memos from Justices Scalia and Ginsburg. It is very good. Life is beautiful.

But then he received Justice Kennedy's concurring opinion responding to, and very politely but firmly disagreeing with, the Chief Justice.⁵⁸ That two-paragraph offering must have caused the Chief Justice to remember those marvelous words from the Righteous Brothers song, thinking of Anthony Kennedy, "You've Lost That Lovin' Feelin'."⁵⁹ In this setting, Justice Kennedy said in effect, "History, Bah-Humbug. The economy and the information in it is now infected with these patent trolls. They are simply out to make a buck. Writing a check is quite enough to compensate

54. *Id.* at 1841 (stating that the "traditional four-factor framework that governs the award of injunctive relief" applies to patents).

55. *See generally id.* at 1838-41.

56. *Id.* at 1841-42 (Roberts, C.J., concurring).

57. *Id.* at 1841.

58. *See generally id.* at 1842 (Kennedy, J., concurring).

59. THE RIGHTEOUS BROTHERS, YOU'VE LOST THAT LOVIN' FEELIN' (Gold Star 1964).

them, but don't allow them to hold up the product or the service." In short, Justice Kennedy warned that the courts must be flexible enough to take into account these unfolding technological realities.⁶⁰

And this is the voice of Silicon Valley. And this is the voice of the future, that of Justice Kennedy, the Justice in the middle. He had three votes on his side—Justices Stevens, Souter, and Breyer—two of whom had been in dissent in the watershed copyright case of *New York Times v. Tasini*.⁶¹ The technological vanguard on the Court had won the battle of the concurrences, four votes to the Chief's three.⁶² Mere intramural relationships aside, this did send a fairly strong message to courts around the country to be cautious with those injunctions that may stand in the way of consumer welfare in the form of products and services getting efficiently to market.

Finally, consider one last case, *Central Virginia Community College v. Katz*,⁶³ one of the truly important cases of the Term not only to the business community but one of enduring significance in the unfolding conversation about the nature and structure of federalism. Federalism was of course the signal achievement—and a controversial one—of the Rehnquist Court. It was a recalibration of power between the states and the federal government. But in the final years of the Rehnquist Court, it appeared that the revolution in federalism had run its course. *Central Virginia* is a case from the Roberts Court's rookie year that would suggest the revolution is indeed over.

At one level, this is a bankruptcy case. Wallace's Bookstores, which did business with Central Virginia Community College among other state colleges, went bankrupt.⁶⁴ The business was being liquidated, and the bookstores were going out of business.⁶⁵ The liquidator, Bernard Katz, appointed by the court, looked around and saw that the bookstores had made certain transfers to the community college that the bankruptcy code would forbid—so-called preferential transfers.⁶⁶ And Central Virginia Community College said in effect, "Mr. Katz, you cannot sue us because we're part of the Commonwealth of Virginia. Please go away."⁶⁷ The Supreme Court said to the college, "Mr. Katz does not have to go away."⁶⁸

In a historically rich opinion authored by Justice Stevens, the five-member majority looked to the Constitutional Convention of 1787, early cases prior to the Convention, and bankruptcy laws passed at the time of the

60. *eBay*, 126 S. Ct. at 1842-43 (Kennedy, J., concurring).

61. 533 U.S. 483 (2001).

62. *eBay*, 126 S. Ct. at 1842-43 (Kennedy, J., concurring).

63. 126 S. Ct. 990 (2006).

64. *Id.* at 994.

65. *See id.*

66. *Id.*

67. *Id.* at 994-95.

68. *Id.* at 1004-05.

Convention.⁶⁹ With that elaborate set of materials, the majority concluded that by agreeing to the Constitution itself, the states had agreed to allow themselves to be sued in bankruptcy; that is, the community college could be sued in federal court.⁷⁰

I pause to note that a great constitutional debate has raged for at least two decades over the issue of “original intent.” Is this an appropriate means of interpreting our nation’s founding document? Let me guide the gentle reader to the majority opinion by Justice Stevens, and to the dissent of four Justices, by Justice Thomas.⁷¹ In my view, the reasonable, objective observer will readily conclude that the Justices—all nine of them—are relying upon the interpretive methodology of discerning original intent and finding that intent authoritative and controlling. They look at the same materials, but they reach different conclusions about what the materials teach.

Justice Thomas, joined in the dissent by the Chief Justice and Justices Scalia and Kennedy, concluded that Article I of the Constitution simply did not speak to the entirely discrete question of state sovereign immunity.⁷²

It is a wonderful, rich debate, and you can and should come to your own views. Obviously, the Justices came to contrasting, indeed downright conflicting, opinions. But that raises an interesting question: If Justice Kennedy was in the dissent, and there were four dissenters, including the Chief Justice, where was Justice Alito? The answer: He was not quite yet on the Court when the *Central Virginia* decision was handed down. The newest Justice was not confirmed until January 31, 2006,⁷³ while this decision was delivered on January 23, 2006. This was one of the very last decisions in which Justice O’Connor was on the Court, and she provided Justice Stevens with that coveted fifth vote. Thus, in her final days of service, she disavowed the Rehnquist Revolution.

This begs another delicious question because the decision was 5-4, Justice O’Connor provided the fifth vote, and she is now gone. Will this trigger the jurisprudential role of Thrasymachus who, in Plato’s *Republic*, opined that “Might makes right”?⁷⁴ Will Justice Alito replacing Justice

69. See *id.* at 990-1005.

70. *Id.* at 1005.

71. See *id.* at 990-1014.

72. See *id.* at 1005-14 (Thomas, J., dissenting).

73. Biographies of Current Members of the Supreme Court, <http://www.supremecourtus.gov/about/biographiescurrent.pdf> (last visited Nov. 6, 2006).

74. See PLATO, *REPUBLIC* *327, *338-42. This is not a direct quote, it is a summary of this work’s thesis.

O'Connor breathe life back into the federalism arena? In short, is the *Central Virginia* case already doomed?

Maybe so, but obviously we can only speculate. But kindly recall that in *Rapanos*, Justice Alito was comfortably a member of the pro-states' rights camp, joining the very muscular defense of state prerogatives articulated by Justice Scalia in his plurality opinion.⁷⁵ So keep watching for tea leaves, and we will be here to keep reading them. But in the meantime, do not overlook the man in the middle, Justice Kennedy.

QUESTIONS BY GINA HOLLAND

GINA HOLLAND: You didn't mention the Anna Nicole Smith case.⁷⁶

DEAN KENNETH W. STARR: Nor do I plan to.

GINA HOLLAND: That was a gift to the reporters. We deal with so many bankruptcy cases. When we get one like that –

Looking ahead to next Term, the punitive damage case⁷⁷ seems to be getting a lot of attention. Any predictions?

DEAN KENNETH W. STARR: To credit Erwin's earlier comment, I respond first by saying, "He or she who lives by the crystal ball, ends up eating chards of glass."⁷⁸ But I do think that it raises some very basic questions jurisprudentially for the two new members of the Court.

The business community, of course, cares deeply about this and the plaintiffs' bar cares very deeply about this. What should be the judicially imposed limits, if any, on the punitive damages? And here Justices Scalia and Thomas have said it is not the role of the courts under the guise of substantive due process to in fact police jury verdicts.⁷⁹ If states want to engage in that sort of "reformation of the laws," that is the business of the states, but it is no business of the federal judiciary or perhaps even the federal government itself. I am sorry I did not have a chance to talk about the Commerce Clause.

So it is up for grabs. Will Chief Justice Roberts follow what one might think are his instincts of minimalism, that the courts really should stay out of these kinds of controversies and just allow them to be worked through at the state level? Or will he, like Justice Stevens, who tends to have a rather robust view of substantive due process, say he is very happy for the courts to

75. *Rapanos*, 126 S. Ct. at 2208.

76. *Marshall v. Marshall*, 126 S. Ct. 1735 (2006).

77. *Williams v. Phillip Morris, Inc.*, 127 P.3d 1165 (Or. 2006), *cert. granted*, 74 U.S.L.W. 3668 (U.S. May 30, 2006) (No. 05-1256).

78. Erwin Chemerinsky, *Civil Rights*, 34 PEPP. L. REV. 544 (2007).

79. *See BMW of N. Am. v. Gore*, 517 U.S. 559, 598-607 (1996) (Scalia, J., dissenting).

play a policing role and, as Justice Kennedy seems to be willing to say, “This really does boil down to numbers and ratios.” It really is up for grabs.

AUDIENCE QUESTIONS FACILITATED BY PROFESSOR MCGOLDRICK

PROFESSOR MCGOLDRICK: In the *Rapanos* case, which is fascinating, because of both the renewal of dual federalism and other kinds of issues, why is it that four Justices could not agree with the significant nexus test of Justice Kennedy?⁸⁰ It seems like four of them could have been brought along on either side.

DEAN KENNETH W. STARR: Professor McGoldrick, you are brilliant and you are way above my pay grade as to why it is that Justice Kennedy was not more influential. We know that the first thing that happens in the dynamic of the Court is that the proposed majority opinion is circulated. Justice Scalia clearly had the assignment. Again, there is a certain inference that I am drawing, but he had the first shot.

He then takes that first shot and has that very deeply textualist approach that alarms Justice Kennedy because of what he was concerned with, namely the West’s river beds drying up and so forth.⁸¹ The approach of the plurality was to emphasize the idea of permanency of the water of precedence.⁸²

And so it may be that we have a very aggressive textualist, which caused Justice Kennedy to say, “I need to find a new way,” because it is not apparent that the nexus was being argued by any of the parties.⁸³ Justice Kennedy was being quite creative, perhaps even clever, in coming up with what he thought was appropriate middle ground. He recognized that the Court could not just do what it wanted, which really was again the issue. The dissenters really said they can just do what they want, even though John Rapanos’ land is eleven miles away from navigable water.⁸⁴ That causes many people to say, “Gosh, that is a long way to the Army Corps of Engineers to try to regulate waters of the United States.” However, we understand the ecosystems, and that is where Kennedy felt perhaps he was doing a great service in saying, “Why can’t we do this?” It has a nice legal

80. See *Rapanos*, 126 S. Ct. at 2214.

81. *Id.* at 2225.

82. *Id.*

83. See *id.* at 2236 (Kennedy, J., concurring) (stating that the Court failed to apply the test, and while the Court of Appeals recognized its applicability, it did not properly apply all the factors of the test).

84. *Id.* at 2214.

standard sound to it because it obviously impresses Professor McGoldrick and that impresses me.